

The High Court's Brexit Decision: A Lesson in Constitutional Law for the UK Government

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Did judges today [declare war](#) on democracy? Did the High Court overstep its mark into political territory? No. The judicial decision in [R\(Miller\)](#) has clearly thrown a spanner in the works of the government's Brexit strategy. But its focus is strictly constitutional, not political. The court expressed no opinion on whether Article 50 TEU should be triggered. The only question it examined was whether, as a matter of UK constitutional law, the Crown, acting through the government, is entitled to use prerogative powers to trigger Article 50 in order to cease to be a member of the European Union [4].

The irrevocability of Art.50

Before the court could tackle UK constitutional law it needed to address a background question, namely whether notification of the European Council under Article 50 could subsequently be reversed. The answer to that question is actually unclear. [Lord Kerr](#), for instance, thinks it is reversible. Moreover, since the question involves a question of EU Treaty law, the final answer could only be given by the Court of Justice of the EU.

The present case did not have to answer that question as both parties assumed that a notice under Art.50(2) cannot be withdrawn and cannot be qualified. The effect of the notice cannot, for example, be made subject to future parliamentary approval of the UK-EU negotiations. It follows, and both parties agreed, that triggering Article 50 'will inevitably result in the complete withdrawal' of the UK from the EU [10; 11].

Constitutional requirements

Article 50(1) TEU allows the UK to withdraw from the EU 'in accordance with its own constitutional requirements'. But what does the UK constitution require? Turning to that question, the court addressed the relationship between the Crown's prerogative powers, i.e. the residue of monarchical authority that is now exercised by ministers, and the doctrine of parliamentary sovereignty. On the one hand, it is an established feature of the UK constitution since 1688 that an Act of Parliament cannot be supplanted by the exercise of a prerogative power [25; 26]. On the other hand, it is equally established that the prerogative powers of the Crown cover international relations and the conclusion of treaties [30].

On the basis of the second point, the government argued that the Crown has a prerogative power to authorise the UK's withdrawal from the EU, and that this power can only be taken away by express terms in an Act of Parliament. In the absence of express statutory words, the prerogative powers of the Crown over Art.50 remain intact [31]. The court acknowledges the government's position as correct, but only with respect to rights and obligations created as a matter of international law. As soon as individual rights protected by domestic law are affected, Parliament must be involved [32; 34].

Individual rights

The court then turned its attention to individual rights protected in domestic law, and the extent to which they would be affected by EU withdrawal.

The parties distinguished between three different categories of rights. The first category embraced rights that were capable of replication in domestic law. The Working Time Directive was given as an example: there is nothing in principle to stop Parliament from enacting its provisions into domestic law. The second category refers to rights enjoyed by UK nationals in other Member States. The third category deals with those rights that cannot be replicated in UK law and would be lost upon withdrawal. The right to be selected and to be elected to the

European Parliament, and to vote in those elections, would be good examples [57-61].

In relation to categories (i) and (ii), the government claimed that the loss of rights would not be as great as put forward by the claimants. In the court's view, the government's submissions on those categories were formally correct, but 'divorced from reality' [66]. But it was in relation to category (iii) that the government conceded that those rights would irretrievably be lost upon withdrawal. It is at this point in the decision [63] that the case was lost. The claimants needed to establish a loss of individual rights in the UK, and the government agreed that category (iii) rights would be lost.

Conclusion

The decision amounts to a proper drubbing for the government. First, it was not the claimants that landed the hammer blow on the government. The government dealt that blow to itself by agreeing that the Art.50 notification would inevitably lead to the loss of some individual rights. Second, it is entirely proper for the court to be looking for express language in an Act of Parliament before it agrees to override a fundamental constitutional principle, such as the subordination of the Crown to law. This is, after all, what the government was asking the court to do. However, it was the Secretary of State who wanted to reverse the burden by demanding that the claimants find express statutory language that *removes* the Crown's powers in the context of international relations. On the central issue, settled since 1688, that the Crown cannot use prerogative powers to remove an Act of Parliament, the Secretary of State was silent. [84]. In the court's opinion, the central plank of the government's submission was 'flawed at this basic level' [84].

The High Court's decision is exemplary in its clarity and reasoning. Anyone interested in a tutorial on the UK constitution should read the first 56 paragraphs. The legal challenge was not supposed to be a major obstacle for the government. All it needed to assert and defend were the UK's own constitutional requirements. In failing to understand the constitution of its own country, the government was taught an embarrassing lesson by the High Court on the Strand. The next stop is the UK Supreme Court.

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